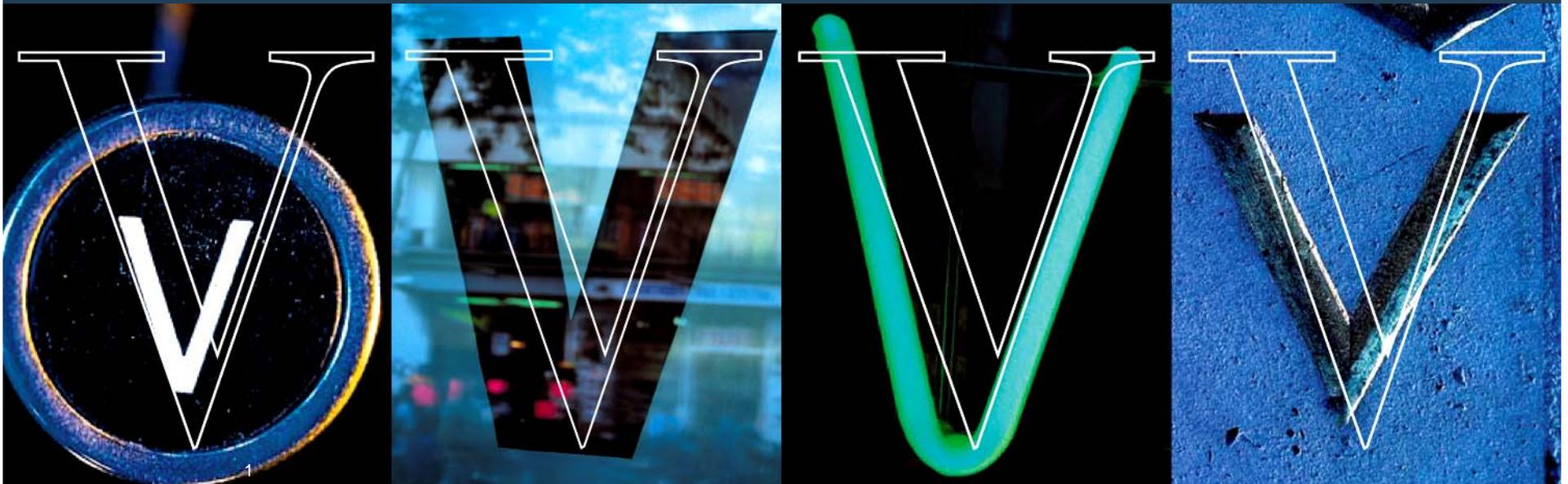


Corruption: The New Global Landscape  
Under U.S. FCPA and U.K. Bribery Act

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# The Foreign Corrupt Practices Act ("FCPA")

- U.S. law enacted by Congress in 1977 to bring a halt to the rampant bribery of foreign government officials.

- Two main provisions:

## 1) Anti-Bribery Provisions:

- Prohibits the paying of, offering, promising to pay (or authorizing to pay or offering) money or "anything of value,"
  - With corrupt intent, directly or indirectly,
  - To a "foreign government official" or political party official,
  - For the purpose of (i) influencing an official act or decision; (ii) causing the official to fail to perform his lawful duty; or (iii) obtaining or retaining business or to secure any improper advantage.
- Certain limited exceptions and affirmative defenses exist.



# The Foreign Corrupt Practices Act (cont'd)

## 2) “Books and Records” Provisions:

- Requires “issuers” (any company, including non-U.S. companies) that publicly trade on a U.S. exchange,
  - To make and keep books and records that “accurately reflect” business transactions, and accounts of all payments, and
  - To devise and maintain reasonable, “effective” internal controls for preventing and detecting FCPA violations.
- Jointly enforced by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).



# Criminal & Civil Penalties

## Criminal Penalties:

- Up to \$2 million per violation for corporations or twice the pecuniary gain, whichever is higher.
- 5 years imprisonment and a fine of up to \$100,000 per violation or twice the pecuniary gain, whichever is higher.

## Civil Penalties:

- For companies listed on a U.S. exchange, as well as any officer, director, or agent of such a company:
  - Disgorgement, and
  - A fine of \$10,000 per violation, as well as
  - Enhanced penalties of up to \$100,000 per violation for an individual and \$500,000 per violation for a corporation.



# Other Potential Penalties

## Private Cause of Action:

- Recent rise in private causes of action against corporations and their executives by shareholders, investors and customers due to FCPA violations.
  - Because there is no private right of action under the FCPA, these suits are frequently brought as common law fraud, securities fraud or civil RICO actions.

## Watch:

- Currently in Congressional Committee, the *Foreign Business Bribery Prohibition Act* (H.R. 2152), which would permit companies subject to the FCPA that lost business as a result of a bribe by a competitor, which is not subject to the FCPA, to bring suit in federal court for treble damages.
- Included in the recent Wall Street Reform bill currently before Congress (H.R. 4173), the *Investor Protection Act of 2009*, which extends rewards to whistleblowers if an SEC action is brought under the Securities laws – including the FCPA – resulting in over \$1 million in sanctions.



## Elements: “Anything of Value”

- Prohibits the paying of, offering, promising to pay (or authorizing to pay or offer) money or “anything of value.”
- Some things we consider to be normal business entertainment or accommodations could fall under the “anything of value” provision:
  - Lavish dinners;
  - Travel;
  - Tickets to sporting events;
  - Golf, gambling or other outings or junkets; and
  - Gifts other than those of nominal value.



## Elements: “Corrupt Payment”

- A Corrupt Payment includes:
  - Any payment or thing of value, which is intended to improperly influence any act or decision, or secure any improper advantage, induce an action or omission or in violation of a lawful duty.



## Elements: “Foreign Official”

- “Foreign official” under the FCPA includes:
  - Any officer or employee of a foreign government (or any instrumentality thereof);
  - Of a public international organization; and
  - Any person acting in an official capacity for or on behalf of such a government or organization.



## Elements: “Foreign Official” (cont’d)

- Foreign political parties and officials and candidates for office;
- Relatives and close associates of foreign officials; and
- Employees of government owned or controlled businesses.
  - For example, a physician in a country with a nationalized medical system.
    - Ass’t Attorney General for the Criminal Division at DOJ, Lanny Breuer, stated recently:
      - » “Indeed, it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a ‘foreign official’ within the meaning of the FCPA.”
- The level of the foreign official’s position is irrelevant.



## Elements: “Retain/Obtain Business”

- To violate the statute, Payment generally must be for purpose of assisting the company, directly or indirectly, in retaining or obtaining business, or directing business to any person.
- “Retaining or obtaining business” is interpreted very broadly.
  - Includes: seeking to achieve any objective that provides any beneficial financial consequence to the person or company
  - For example, avoidance of taxes, customs clearance, or accelerated reimbursements by a government.
    - U.S. v. Kay (5<sup>th</sup> Cir. 2004): “Business nexus element” – “[W]e hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage.”
  - Note: The business involved does *not* have to be with a foreign government. Payments to gain the improper assistance of a government official in obtaining business from a non-governmental entity can also fall within FCPA.



## Affirmative Defenses

- Two affirmative defenses:
  - 1) When the payment is lawful under the written laws of the foreign official's country; or
  - 2) When the payment is a reasonable and *bona fide* expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official and was directly related to:
    - The performance, demonstration, or explanation of products or services; or
    - The execution or performance of a contract with a foreign government or agency.
- Dangerous Territory: Consult counsel expert in the FCPA before determining that either of these defenses apply



## “Facilitation Payment” Exception

- Historically, an “exception” for nominal payments to facilitate routine government actions.
  - Action sought to be facilitated must be ministerial,
  - Not involve any discretion by the government official, and
  - Amount paid must be modest.
- “Facilitation payment” exception has always been very strictly interpreted.
- Tension with “business nexus concept.”
- Contrary to OECD Treaty. U.S. carved out a “facilitation payment” exception and is under pressure to amend the statute. Congress likely to abolish the exception.



# FCPA Jurisdiction

- The FCPA applies to *all* U.S. companies conducting business abroad, most non-U.S. subsidiaries of U.S. companies, and U.S. subsidiaries of non-U.S. companies
  - Non-U.S. companies with securities that trade on U.S. exchanges via ADR's ("American Depository Receipts") are subject to the FCPA.
- *Respondeat Superior* Liability:
  - Companies subject to FCPA jurisdiction are held responsible for the actions of their:
    - Employees, agents, independent sales representatives, and distributors;
    - Service providers; and
    - Joint venture partners when acting on the company's behalf.
- FCPA also applies to all U.S. citizens & resident aliens.



## FCPA Jurisdiction (cont'd)

- Any transaction that touches the United States in any way, for example, a telephone call or e-mail made or received in the United States or a dollar denominated transaction cleared through a U.S. correspondence account, confers jurisdiction in an FCPA matter, whether or not U.S. companies or U.S. nationals are involved.
- Successor Liability:
  - Companies acquiring or partnering with another entity are expected to perform FCPA due diligence or face potential successor liability.
    - Even companies acquiring a minority interest may face FCPA liability.



## FCPA Jurisdiction (cont'd)

- Very few judicial decisions. Most cases settle before trial.
- Therefore, DOJ/SEC “common law” governs the practical interpretation and enforcement of the statute
  - U.S. v. Kay (5<sup>th</sup> Cir. 2004): Leading case interpreting FCPA.
  - Likely to change with the rise in enforcement against individuals.
    - See U.S. v. Kozeny (SDNY 2007)



## Enforcement More Vigorous Each Year

- Roughly 32 FCPA enforcement cases brought between 2004 and 2006, with an increasing trend:
  - 38 cases in 2007;
  - 33 cases in 2008; and
  - 40 cases in 2009.
  - 14 resolved enforcement actions through Q1 of 2010 (compared with seven through same period 2009).
  - 23 unresolved charged brought through Q1 of 2010 (compared with two through same period 2009).
- More criminal cases brought since 2005, approximately 60, than between 1977 and 2005.
- Over 140 active FCPA investigations in 2009.
- “Inter-departmental initiatives.”



## Recent Enforcement Examples

- **Vetco Gray**: In 2007, freight forwarder Vetco Gray paid a total combined fine of \$26 million for violating the FCPA, primarily through the bribery of Nigerian Customs officials.
  
- **Seimens AG**: In 2008, the SEC and DOJ announced a record \$800 million settlement (\$450 million criminal fine and \$350 million in disgorgement of profits) with Siemens AG.
  - Alleged bribery scheme of unprecedented scale and geographic reach, involving more than \$1.4 billion in bribes to government officials on five continents.
  
  - Settlement was part of a \$1.6 billion global anti-corruption settlement between Siemens and the SEC, the U.S. DOJ and the Office of the Prosecutor General in Munich, Germany.



## Recent Examples

- **BAE Systems, plc**: In 2010, multinational defense contractor, BAE, reached concurrent agreements with the U.K. Serious Fraud Unit and DOJ for violations of anti-corruption and books & records laws.
  - **Corrupt Facilitation Payments by “Advisors”**: BAE made unlawful payments to “market advisors” to facilitate sales of defense articles to East European & Middle Eastern governments. BAE “failed to conduct adequate due diligence into these advisors” who were acting as BAE agents.
  - **FCPA Compliance Policy/Procedures**: DOJ emphasized that BAE promised to develop an FCPA compliance program in 2000, and “despite these statements regarding an anti-corruption policy,” BAE did not create “sufficient mechanisms” to comply with the FCPA or OECD Anti-Bribery Convention.
  - **Penalties**: BAE agreed to a criminal fine of \$400 million to U.S. authorities and £30 million to the U.K., further illustrating a trend of increased multi-national cooperation in bribery investigations and prosecutions, especially between the U.S. and the U.K.



## Recent Examples

- **Daimler AG**: In March 2010, Daimler, the car manufacturer, agreed to a guilty plea, deferred prosecution agreement, three years corporate monitoring, and over \$180 million in DOJ and SEC fines for alleged bribes to foreign government officials from 1998 to 2008 in over 22 countries.
  - **Corrupt Payments** ranged from gifts (e.g., entertainment and travel) to officials in Indonesia, to a “special commissions account,” where Daimler inflated the price of its cars in China and paid the excess profit to officials through special bank accounts.
  - **Non-U.S. subsidiaries:**
    - Daimler’s Russian and German subsidiaries pled guilty as part of the criminal settlement.



# Recent Examples

- **AGA Medical Corporation:** In June 2008, AGA, a privately-held medical device manufacturer, voluntarily disclosed payments to physicians employed by Chinese government-owned hospitals to induce the purchase of devices to treat congenital heart defects. AGA set up an agreement with a Chinese company to be its sole distributor, and all payments were made through local distributor.
  - **Actions of Distributor Charged to AGA.** The Chinese distributor arranged and entered into contracts for AGA, negotiated all prices and employed sales people. AGA was informed only that the hospital asked for a "discount" and doctors asked for a "commission."
  - **DOJ determined:**
    - Payments were made to induce and obtain contracts for AGA's medical devices, and that government-owned and controlled hospitals were "instrumentalities" of the Chinese government.
    - Physicians employed by government-owned hospitals are "foreign officials."
  - **Penalties:** AGA voluntarily disclosed and settled for \$2,000,000 in criminal penalties, the imposition of an FCPA compliance program and independent corporate monitoring for a three-year period.



# Recent Examples

## ■ Nature's Sunshine Products, Inc.:

### – Books and Records:

- In 2009, SEC alleged that NSP's wholly-owned subsidiary in Brazil had made corrupt payments to Brazilian customs officials and falsified its books, records, and accounts to hide the nature of payments.
  - Brazilian government reclassified certain vitamins/herbal products as "medicines." When unable to register products under the new classifications, NSP Brazil allegedly paid Brazilian customs brokers and customs officials to facilitate importation of unregistered products.
- Books and Records violations often the preferred outcome to an FCPA violation because of collateral consequences of criminal violation of the bribery provisions such as possible debarment of U.S. government contractor.
- **Control Person Liability:** Even though the SEC did not allege that Executives had "personal knowledge" of payments, it charged NSP's COO & CFO for directly or indirectly:
- Failing to make and keep accurate "books and records that reflected in reasonable detail" NSP's product registration; and failing to "adequately supervise NSP personnel in devising and maintaining a system of internal controls."
  - Case may open door to broader enforcement effort against executives based on claim of failure to "supervise adequately" employees responsible for books and records as well as internal controls.



## Recent Examples

### ■ Panalpina:

- The giant multi-national Swiss logistics company announced that it had reserved \$120 million to cover potential FCPA and antitrust penalties.
- The FCPA investigation concerns alleged payments to customs officials in West Africa and the former Soviet Union to facilitate customs clearances and procedures.



## Enforcement Against Individuals

- In DOJ's view, too many companies factored potential FCPA fines into the cost of doing business. Accordingly, DOJ has increased its prosecution of management and employees, which DOJ believes will have a greater deterrent effect.
- In 2009, more than a dozen individuals were indicted for FCPA violations and eight individuals were either found guilty at trial or pled guilty.
  - For example, in September 2009, U.S. film producers Gerald and Patricia Green were found guilty of conspiracy to violate the FCPA for paying approximately \$1.8 million in kickbacks to the former governor of the Tourism Authority of Thailand in exchange for film festival and other contracts.
  - Sentencing has been delayed several times -- DOJ is seeking what would amount to a life sentence for 76-year old Gerald Green.



## Enforcement Against Individuals (cont'd)

- **The “Sting” (Jan. 2010):** DOJ indicted 22 executives and employees of small and medium-sized military and law enforcement supply companies, for alleged FCPA violations.
  - Sting stemmed from a two and a half year undercover operation -- single largest investigation and prosecution of individuals for FCPA violations.
  - First use of undercover law enforcement techniques in a foreign corporate bribery case.
  - Corrupt “Commission” Payments. Involved fictitious defense minister of African country for \$15 million contract to outfit country's presidential guard.
  - Two undercover FBI agents posed as representatives of the minister, asking each U.S. business to pay a 20% "commission" to secure a portion of a procurement deal.
  - Each defendant agreed to the scheme, even after being informed that half of "commission" would go directly to the minister, and agreed to prepare two price quotations, one including the 20% payment.
    - DOJ Ass't AG Breuer: “These actions are a turning point. From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent.”





# Bribery Act: the legal landscape

**by Tony Lewis**

Field Fisher Waterhouse LLP

25 June 2010

# Historical context

## Old legislation:

- Complex, outdated and inconsistent
- Uncertainty in application, difficult to prosecute
- Almost impossible to prosecute companies

## Enforcement record

- Abandonment of BAE systems investigation
- OECD – ‘serious concerns’ at UK’s failure to address deficiencies in laws



# The Bribery Act 2010 - Overview

- Section 1 – Giving or offering a bribe
- Section 2 – Receiving or requesting a bribe
- Section 6 – Bribery of a foreign public official
- Section 7 – Corporate offence of failing to prevent bribery
- Individual Penalties – up to 10 years imprisonment
- Corporate Penalties – unlimited fine

# Bribing another person

## Section 1

- Where a person (P)
  - Offers, promises or gives a financial or other advantage to another person; and
- P intends the advantage
  - To induce a person to perform improperly a function or activity; or
  - To reward a person for the improper performance of a function or activity

# Requesting or Receiving a Bribe

## Section 2

- Generally mirrors the 'Active Bribery' offences
- Where a person requests, agrees to receive or accepts a financial or other advantage...
- Linked to improper performance of a function or activity

## Sections 1 and 2

- Financial or other advantage – question of fact
- “Function or activity”
  - Does not need to have a connection to the UK or be carried out in the UK
  - Includes activities of a public nature, connected with a business or performed on behalf of a body of persons
- What does “improper”/ “improperly” mean?
  - Person performing the function or activity is in breach of an expectation of good faith, impartiality or trust
  - Test is based on UK standards



## Liability of others who may be involved

- Individual liable if advantage conveyed through a third party
- “Senior officer” liable if “consent or connive”
  - Senior officer includes “a manager”
  - Potential liability for “blind eye” knowledge
- Corporate liable if “directing mind or will” aware



## Section 6: Bribery of foreign public official

- A person is guilty of an offence if he offers promises or gives a financial advantage to a foreign public official with the intention to influence the official in his capacity as a foreign public official.
- Person must intend to obtain or retain business or an advantage in the conduct of business
- It is not an offence if the applicable law permits or requires the foreign official to be influenced by the payment or gift.
- No carve out for facilitation payments

# The Corporate Offence

## The offence

- Any person performing services for or on behalf of a company or partnership paid a bribe
- The bribe was in connection with the commercial organisation's business
- No corporate liability for receiving bribes

## Jurisdiction

- Extends to commercial organisations carrying on business in the UK
- It does not matter where in the world the bribe took place

## Defence

- To show that “adequate procedures” have been implemented to prevent bribery



# Performing Services

- A company commits an offence if any person “*performing services for or on behalf*” of a company or partnership pays a bribe in connection with its business
- Definition is deliberately vague
- The person may be the company’s employee, agent or subsidiary (but these are only examples)
- “*performing services*” – determined by reference to all the circumstances



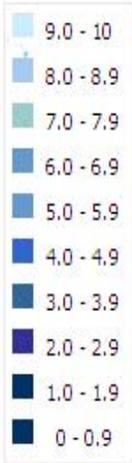
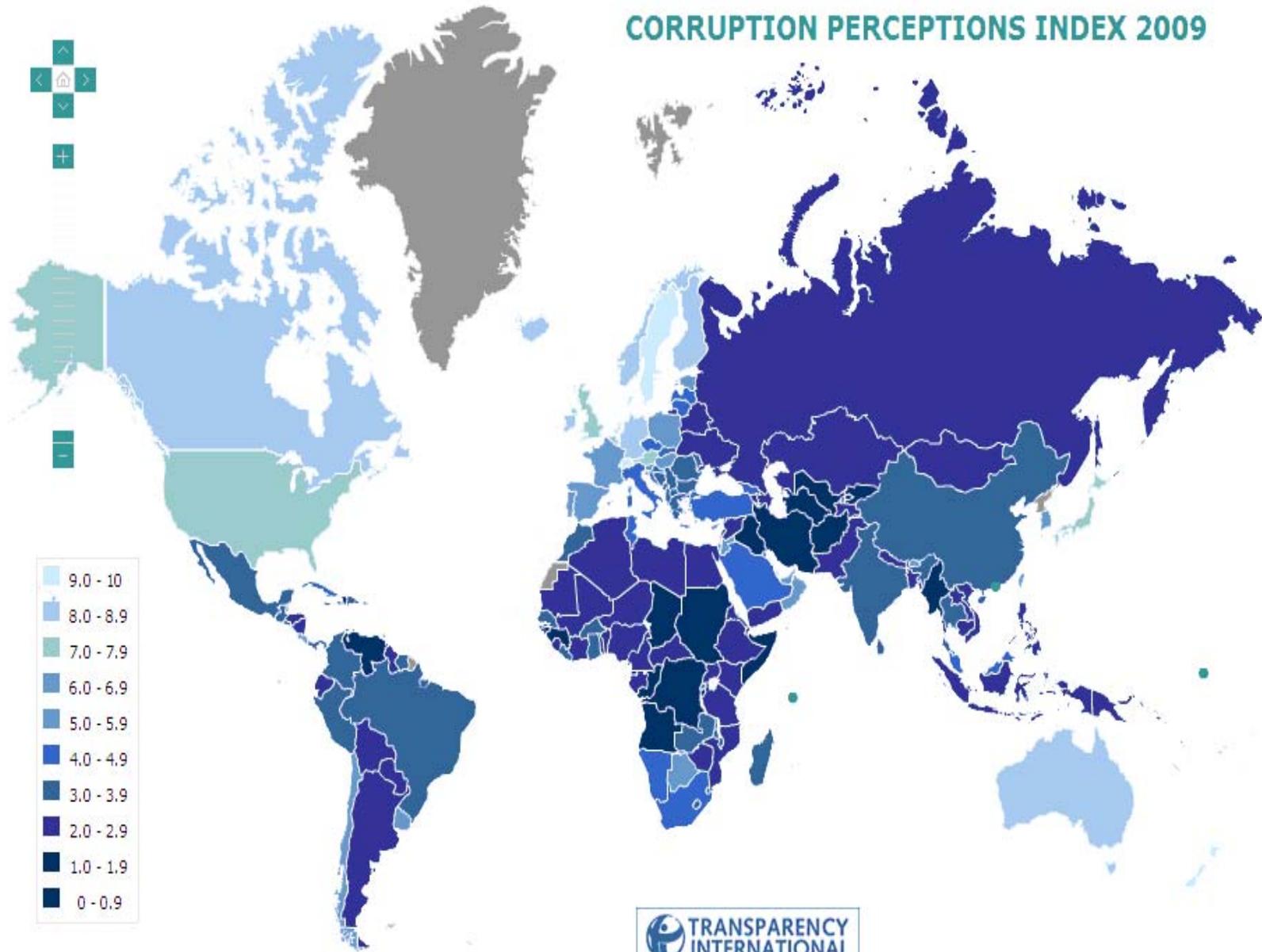
## Adequate procedures defence

- Defence for a commercial organisation to show it had in place '**adequate procedures**' designed to prevent bribery being committed on its behalf
- Government Guidance expected Summer 2010
- Others sources of guidelines eg SFO Guidance, FCPA experience
- A risk based approach
  - Country risk
  - Function risk



## Practical tips

- Ensure that there is a senior person responsible for compliance matters
- Risk assessments
- Anti-Corruption policy
- Training
- Due diligence on business relationships
- Monitoring systems





## Serious Fraud Office – self reporting

- SFO actively encourages self reporting of corruption
- Prospect of a civil rather than criminal outcome
- Recent experience:  
*R v Innospec Limited* 26.03.10  
DePuy 13.05.10



## Key points

- Strict liability criminal offence for commercial organisations
- Worldwide ambit
- Liability for those “performing services”
- Adequate procedures defence
- Expected to be in force late 2010



# Bribery Act: the legal landscape

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# FCPA and Bribery Act: Compare and Contrast

## ■ Scope:

- FCPA: Only prohibits bribes paid or offered to “foreign officials.”
- Bribery Act: Not limited to “foreign officials;” applies to bribes to any person; accordingly, encompasses commercial bribery.
- FCPA: Only prohibits act of payment, or offering of payment
- Bribery Act: Applies to both act or offering of payment, and receipt of a bribe.
- FCPA: *Respondeat Superior* Liability. Non-prosecution/mitigation for a pre-existing, vigorous compliance program.
- Bribery Act: Corporate offense for failure to prevent bribe. Affirmative defense that company had adequate compliance program.

## ■ Facilitation Payments:

- FCPA: Exception for payments to foreign official to perform routine governmental action.
- Bribery Act: No facilitation payment exception.



# FCPA and Bribery Act: Compare and Contrast (cont'd)

- **Jurisdiction:**
  - FCPA: Applies to U.S. companies and persons, non-U.S. companies listed on U.S. stock exchange, or any bribery scheme in which an act occurred in the U.S.
  - Bribery Act: Applies to U.K. nationals or residents as well as all commercial organizations, wherever incorporated, that carry on business or a part of a business in the U.K.
  
- **Allowable Under Local Law:**
  - FCPA: Affirmative Defense if payment is lawful under written laws/regulations of foreign country.
  - Bribery Act: No violation if permissible under written laws of foreign country (applies to bribery of foreign official only).
  
- **Business Promotion Expenditures:**
  - FCPA: Affirmative Defense for reasonable expenditures directly related to business promotion or contract performance.
  - Bribery Act: No such affirmative defense (but arguably such expenditures are not “improper,” and therefore not a Bribery Act violation).



# FCPA and Bribery Act: Compare and Contrast (cont'd)

- **Books and Records Provision:**
  - FCPA: Separate from anti-bribery provision; failure to comply can result in civil or criminal liability.
  - Bribery Act: Contains no similar provisions; Secretary of State must publish guidance about adequate procedures companies can put in place as affirmative defense to criminal prosecution.
  
- **Enforcement:**
  - FCPA: Both civil and criminal enforcement.
  - Bribery Act: Criminal enforcement only.



# Organization for Economic Cooperation and Development (OECD)

- 38 countries have adopted the OECD Anti-Bribery Convention, requiring national legislation criminalizing the bribery of foreign officials to gain advantages in international business transactions,
  - Including Canada, Brazil, France, Germany, Italy, Japan, U.S., and the U.K.
- It is the only international instrument that requires countries to establish national laws that hold their citizens and companies accountable for the bribery of foreign public officials committed anywhere in the world.



# Organization for Economic Cooperation and Development (cont'd)

- Key Provisions:
  - Scope: Applies to both individuals and companies, as well as third party intermediaries.
  - Accounting: Establish laws, as necessary, on maintenance of books and records, financial statement disclosures, and accounting and auditing standards.
  - Facilitation payments: Prohibited
  - Monitoring: Establishes systematic monitoring of countries' implementation of the Convention.
  
- 3 Phases
  - Phase I: Evaluation of countries' implementing legislation (Completed 2006).
  - Phase II: Assessment of effectiveness of implementing legislation (Completed 2008).
  - Phase III: Continual assessment of Convention enforcement mechanisms (Began 2010).



# International Cooperation

- As other nations have enacted anti-corruption legislation, there has been an increase in international cooperation and multi-jurisdictional investigations.
- Recent examples include:
  - Siemens (U.S. and Germany);
  - Novo-Nordisk (U.S. and Denmark);
- Nowhere is this cooperation more robust than between U.S. and U.K.:
  - BAE Systems: U.S. cooperation w/ Serious Fraud Office
  - “Sting:” U.S. cooperation w/ London City Police, Israel
  - Alcoa: Joint US-UK investigation ongoing into alleged bribery by agent of aluminum producer Alcoa, who has ties to prominent U.S. and U.K. politicians



## FCPA/Bribery Act “Red Flags”

- The transaction is in, or involves, a country identified as being a high corruption risk (e.g., Indonesia, China, Iraq, Afghanistan).
- Sales representative or agent is requesting an unusually high “commission” or fee.
- The entertaining of, or giving gifts to, government officials or their relatives.
- Unusual contract terms or payment arrangements such as requests for payments in cash or “special” invoices.
- The use of shell companies.



## Additional FCPA/Bribery Act “Red Flags”

- The foreign customer’s insistence that a particular agent be used.
- Role or function of an agent or middleman is unusual or not clear.
- Extraordinary payments.
- Charitable donations.
- Payments via third countries without sound commercial reasons.



# FCPA/Bribery Act Corporate Compliance Programs

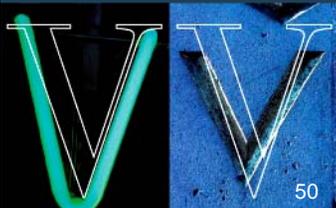
- Best way to protect given the nature of *respondeat superior* liability & affirmative defense to strict corporate liability under the FCPA & Bribery Act is:
- A comprehensive and vigorous compliance program that is more than “mere paper.”
  - **Tailored Company Policy and Training.** One size does not fit all. What is the volume of your company’s business abroad? In what countries? Does your company rely on distributors or agents in foreign countries? Are you part of a joint venture or partnership?
  - **Global Implementation.** Corporate FCPA/Bribery Act Compliance Programs must apply not only to
    - U.S. and/or U.K. entity and its employees,
    - But also to agents, consultants, distributors, joint venture partners, or other business affiliates, in all countries in which it is doing business.
  - **Frequent Training and Oversight.** Educate managers and employees about the FCPA and the Bribery Act. Create and maintain a culture of FCPA/Bribery Act compliance.
    - Conduct annual training.



# Compliance Program Basics

## ■ Rigorous Controls:

- Effective financial and business partner due diligence controls must be designed, maintained, and tested.
- Agent due diligence “check list:”
  - Assess risk of doing business in each country;
  - Check applicable anti-bribery conventions and local national law;
  - Consult with U.S. and U.K. embassies;
  - Third-party risk consultants; and
  - Match degree of due diligence to risk.
- Monitor agents’ & business partners’ FCPA/Bribery Act compliance to the extent possible.
- Accurate & contemporaneous accounting records required
  - Ensure that your organization is tracking, vetting and appropriately monitoring:
    - Promotional accounts;
    - Charitable giving;
    - Entertainment expenses;
    - Payments to middlemen, agents or distributors.



## Compliance Programs (cont.)

### ■ **Certifications of FCPA/Bribery Act**

#### **Compliance:**

- Ensure that contracts and agreements with agents and other business partners have clauses with acknowledgement of the FCPA and Bribery Act, and,
  - An agreement to abide by it.
  - Require written certification from agents and partners to provide added assurances that proper FCPA and/or Bribery Act compliance and due diligence measures were performed.
- 
- Periodic audits must be conducted, and any violations of the policy or the law should be dealt with appropriately.
  - A senior manager with independent decision making authority should have direct responsibility over program.



# What If a Violation Arises?

## **An organization's response must be swift:**

- Stop conduct in question and mitigate risks;
- Retain counsel;
- Preserve all electronic data;
- Ensure that no hard copies of documents are destroyed; and
- Conduct a thorough inquiry.

## ■ **In-house or outside Investigation:**

- Level of employees involved;
- Nature of allegation;
- Benefits of independence versus cost savings;
- Attorney-client privilege; and
- Discuss with outside counsel expert in FCPA/Bribery Act.

## ■ **Challenges of multi-jurisdictional investigations:**

- Retain counsel in both jurisdictions;
- Privacy laws, employment laws, national anti-corruption laws;
- Difficulties answering to two or more law enforcement agencies:
  - Immunity, non-prosecution agreements, sharing of information, settlement, etc.



# What If a Violation Arises?

- **Voluntary Disclosure:**
  - If you discover the potential violation before the government does, consider the benefits of voluntary disclosure.
  - While not mandated, voluntary disclosure frequently helps avoid prosecution or mitigates civil and criminal penalties.
    - Not surprisingly, “full cooperation” with DOJ is central. If so, you may receive a “meaningful benefit” for that cooperation.
    - Voluntary disclosures should not be undertaken without the advice of counsel expert in the FCPA/Bribery Act.



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